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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

**JORDAN MARKS,
INDIVIDUALLY AND ON
BEHALF OF ALL OTHERS
SIMILARLY SITUATED,**

Plaintiff,

v.

CRUNCH SAN DIEGO, LLC,

Defendant.

Case No.: '14CV0348 JAH BLM

CLASS ACTION

**COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF PURSUANT
TO THE TELEPHONE CONSUMER
PROTECTION ACT, 47 U.S.C. § 227,
ET SEQ.**

JURY TRIAL DEMANDED

INTRODUCTION

1. JORDAN MARKS (“Plaintiff”) brings this Class Action Complaint for damages, injunctive relief, and any other available legal or equitable remedies, resulting from the illegal actions of CRUNCH SAN DIEGO, LLC (“Crunch” or “Defendant”) in negligently contacting Plaintiff on Plaintiff’s cellular telephone, in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq., (“TCPA”), thereby invading Plaintiff’s privacy. Plaintiff alleges as follows upon personal knowledge as to himself and his own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by his attorneys.
2. The TCPA was designed to prevent calls and messages like the ones described within this complaint, and to protect the privacy of citizens like Plaintiff. “Voluminous consumer complaints about abuses of telephone technology – for example, computerized calls dispatched to private homes – prompted Congress to pass the TCPA.” *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744 (2012).
3. In enacting the TCPA, Congress intended to give consumers a choice as to how creditors and telemarketers may call them, and made specific findings that “[t]echnologies that might allow consumers to avoid receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumer. TCPA, Pub.L. No. 102–243, § 11. Toward this end, Congress found that

[b]anning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.

Id. at § 12; *see also Martin v. Leading Edge Recovery Solutions, LLC*, 2012 WL 3292838, at* 4 (N.D.Ill. Aug. 10, 2012) (citing Congressional findings on TCPA's purpose).

4. Congress also specifically found that "the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call...." *Id.* at §§ 12-13. *See also, Mims*, 132 S. Ct. at 744.
5. As Judge Easterbrook of the Seventh Circuit recently explained in a TCPA case regarding calls to a non-debtor similar to this one:

The Telephone Consumer Protection Act ... is well known for its provisions limiting junk-fax transmissions. A less-litigated part of the Act curtails the use of automated dialers and prerecorded messages to cell phones, whose subscribers often are billed by the minute as soon as the call is answered—and routing a call to voicemail counts as answering the call. An automated call to a landline phone can be an annoyance; an automated call to a cell phone adds expense to annoyance.

Soppet v. Enhanced Recovery Co., LLC, 679 F.3d 637, 638 (7th Cir. 2012).

JURISDICTION AND VENUE

6. This Court has federal question jurisdiction because this case arises out of violations of federal law. 47 U.S.C. §227(b); *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740 (2012).
7. Venue is proper in the United States District Court for the Southern District of California pursuant to 28 U.S.C. § 1391 because Plaintiff resides within this judicial district, Defendant resides within the judicial district, and many of the acts and transactions giving rise to this action occurred in this district because Defendant:
 - (a) is authorized to conduct business in this district and has intentionally availed itself of the laws and markets within this district;

- (b) does substantial business within this district and maintains a gym in El Cajon, California;
- (c) is subject to personal jurisdiction in this district; and
- (d) the harm to Plaintiff occurred within this district.

PARTIES

8. Plaintiff is, and at all times mentioned herein was, a citizen and resident of the State of California. Plaintiff is, and at all times mentioned herein was, a “person” as defined by 47 U.S.C. § 153 (39).
9. Plaintiff is informed and believes, and thereon alleges, that Defendant is, and at all times mentioned herein was, a limited liability corporation whose state of incorporation is Delaware and principal place of business is in New York, New York. Defendant, is and at all times mentioned herein was, a corporation and is a “person,” as defined by 47 U.S.C. § 153 (39). Defendant is a company that owns and operates gyms in California, Washington, Connecticut, Oregon, New York, Florida, Texas, New Jersey, Virginia, Texas and the District of Columbia. Plaintiff alleges that at all times relevant herein, Defendant conducted business in the State of California, in the County of San Diego, and within this judicial district.

FACTUAL ALLEGATIONS

10. Sometime prior to November 20, 2012, Plaintiff entered into a contractual relationship with Defendant for the purpose of utilizing a gym membership offered by Defendant.
11. On or about November 20, 2012, Defendant sent a text message to Plaintiff’s cellular telephone number ending in “4700.”
12. This text message read as follows:

Give the Gift of Health:Crunch El Cajon-Black Friday
Specials have started! Special Family Rate-\$0 enroll +
prorate & monthly rate-6197496939 exp:11/25 reply S

13. On or about June 13, 2013, Defendant sent an additional text message to Plaintiff's cellular telephone number ending in "4700."

14. This text message read as follows:

Crunch Fitness:Att:Fathers,Dads & Grads-\$0 enrollment
on all monthly memberships this wknd or \$99 for the
year (Base)! 6/13-6/16 6197496939 exp:6/16 reply STOP

15. On or about October 18, 2013, Defendant sent an additional text message to Plaintiff's cellular telephone number ending in "4700."

16. This text message read as follows:

Happy 2 Year Anniversary- Crunch:Special Personal
Training Rates(5-30min \$99)(5-60min \$189) 1st time
client-3days free for family 6197496939 exp: 10/20 reply
ST

17. Defendant sent these text messages to Plaintiff's cellular telephone via Short Message Service ("SMS") 873-65.

18. Defendant used an "automatic telephone dialing system" ("ATDS") as defined by 47 U.S.C. § 227(a)(1) and prohibited by 47 U.S.C. § 227(b)(1)(A) to send these multiple text messages to Plaintiff's cellular telephone seeking to solicit additional business from Plaintiff.

19. This ATDS has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator.

20. This ATDS also has the capacity to send text messages to cellular telephone numbers from a list of telephone numbers automatically and without human intervention.

21. Plaintiff's telephone number ending in 4700, which was called by Defendant via text message on multiple occasions, was assigned to a cellular telephone service for which Plaintiff incurred a charge for incoming calls and text messages pursuant to 47 U.S.C. § 227(b)(1).

22. These text messages constituted calls that were not for emergency purposes as defined by 47 U.S.C. § 227(b)(1)(A)(iii).

23. Plaintiff did not provide Defendant with Plaintiff's prior express consent to receive text messages, including automated text messages, on Plaintiff's cellular telephone, pursuant to 47 U.S.C. § 227(b)(1)(A).

24. These text messages from Defendant, or its agents, violated 47 U.S.C. § 227(b)(1).

CLASS ACTION ALLEGATIONS

25. Plaintiff brings this action on behalf of himself and on behalf of all others similarly situated (the "Class").

26. Plaintiff represents, and is a member of the Class, consisting of:

All persons within the United States of America who received a text message from Defendant or its agent/s and/or employee/s on said person's cellular telephone that was sent using an automatic telephone dialing system.

27. Defendant and its employees or agents are excluded from the Class. Plaintiff does not know the number of members in the Class, but believes the Class members number in the tens of thousands, if not more. Thus, this matter should be certified as a Class action to assist in the expeditious litigation of this matter.

28. Plaintiff and members of the Class were harmed by the acts of Defendant in at least the following ways: Defendant, either directly or through its agents, illegally contacted Plaintiff and the Class members via their cellular telephones by using an ATDS, thereby causing Plaintiff and the Class members to incur certain cellular telephone charges or reduce cellular telephone time for which Plaintiff and the Class members previously paid,

1 and invading the privacy of said Plaintiff and the Class members. Plaintiff
2 and the Class members were damaged thereby.

3 29. This suit seeks only damages and injunctive relief for recovery of economic
4 injury on behalf of the Class, and it expressly is not intended to request any
5 recovery for personal injury and claims related thereto. Plaintiff reserves the
6 right to expand the Class definition to seek recovery on behalf of additional
7 persons as warranted as facts are learned in further investigation and
8 discovery.

9 30. The joinder of the Class members is impractical and the disposition of their
10 claims in the Class action will provide substantial benefits both to the parties
11 and to the court. The Class can be identified through Defendant's records or
12 Defendant's agents' records.

13 31. There is a well-defined community of interest in the questions of law and
14 fact involved affecting the parties to be represented. The questions of law
15 and fact to the Class predominate over questions which may affect
16 individual Class members, including the following:

- 17 a) Whether, within the four years prior to the filing of this Complaint,
18 Defendant or its agents sent a text message to the Class (other than
19 text message sent for emergency purposes or made with the prior
20 express consent of the called party) using any automatic dialing and/or
21 text messaging system to any telephone number assigned to a cellular
22 phone service;
- 23 b) Whether Plaintiff and the Class members were damaged thereby, and
24 the extent of damages for such violation; and
- 25 c) Whether Defendant and its agents should be enjoined from engaging
26 in such conduct in the future.

27 32. As a person who received at least one text message from Defendant using an
28 ATDS without Plaintiff's prior express consent, Plaintiff is asserting claims

1 that are typical of the Class. Plaintiff will fairly and adequately represent
2 and protect the interests of the Class in that Plaintiff has no interests
3 antagonistic to any member of the Class.

4 33. Plaintiff and the members of the Class have all suffered irreparable harm as
5 a result of the Defendant's unlawful and wrongful conduct. Absent a class
6 action, the Class will continue to face the potential for irreparable harm. In
7 addition, these violations of law will be allowed to proceed without remedy
8 and Defendant will likely continue such illegal conduct. Because of the size
9 of the individual Class member's claims, few, if any, Class members could
10 afford to seek legal redress for the wrongs complained of herein.

11 34. Plaintiff has retained counsel experienced in handling class action claims
12 and claims involving violations of the Telephone Consumer Protection Act.

13 35. A class action is a superior method for the fair and efficient adjudication of
14 this controversy. Class-wide damages are essential to induce Defendants to
15 comply with federal and California law. The interest of Class members in
16 individually controlling the prosecution of separate claims against Defendant
17 is small because the maximum statutory damages in an individual action for
18 violation of privacy are minimal. Management of these claims is likely to
19 present significantly fewer difficulties than those presented in many class
20 claims.

21 36. Defendant has acted on grounds generally applicable to the Class, thereby
22 making appropriate final injunctive relief and corresponding declaratory
23 relief with respect to the Class as a whole.

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FIRST CAUSE OF ACTION
NEGLIGENT VIOLATIONS OF THE
TELEPHONE CONSUMER PROTECTION ACT
47 U.S.C. § 227 ET SEQ.

37. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.
38. The foregoing acts and omissions of Defendant constitute numerous and multiple negligent violations of the TCPA, including but not limited to each and every one of the above-cited provisions of 47 U.S.C. § 227 et seq.
39. As a result of Defendant's negligent violations of 47 U.S.C. § 227 et seq., Plaintiff and the Class are entitled to an award of \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).
40. Plaintiff and the Class are also entitled to and seek injunctive relief prohibiting such conduct in the future.

SECOND CAUSE OF ACTION
KNOWING AND/OR WILLFUL VIOLATIONS OF THE
TELEPHONE CONSUMER PROTECTION ACT
47 U.S.C. § 227 ET SEQ.

41. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.
42. The foregoing acts and omissions of Defendant constitute numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each and every one of the above-cited provisions of 47 U.S.C. § 227 et seq.
43. As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227 et seq., Plaintiff and the Class are entitled to an award of \$1,500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

44. Plaintiff and the Class are also entitled to and seek injunctive relief prohibiting such conduct in the future.

PRAYER FOR RELIEF

Wherefore, Plaintiff respectfully requests the Court grant Plaintiff and the Class members the following relief against Defendant:

FIRST CAUSE OF ACTION FOR NEGLIGENT VIOLATION OF THE TCPA, 47 U.S.C. § 227 ET SEQ.

- As a result of Defendant's negligent violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for himself and each Class member \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).
- Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such conduct in the future.
- Any other relief the Court may deem just and proper.

SECOND CAUSE OF ACTION FOR KNOWING/WILLFUL VIOLATION OF THE TCPA, 47 U.S.C. § 227 ET SEQ.

- As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for himself and each Class member \$1,500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).
- Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such conduct in the future.
- Any other relief the Court may deem just and proper.

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TRIAL BY JURY

45. Pursuant to the seventh amendment to the Constitution of the United States of America, Plaintiff is entitled to, and demands, a trial by jury.

Dated: February 12, 2014

Respectfully submitted,

KAZEROUNI LAW GROUP, APC

By: /s Abbas Kazerounian
ABBAS KAZEROUNIAN, ESQ.
ATTORNEY FOR PLAINTIFF